Lingkaran Luar Butterworth (Penang) Sdn Bhd v Perunding Jurutera DAH Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–24–68 OF 2004
RAUS SHARIF J
6 MAY 2005

Civil Procedure — Arbitration — Jurisdiction of arbitrator — Concurrent hearings and consolidation of action — Effect of arbitration clause — Not party to contract — Whether can be joined in arbitration proceedings

Civil Procedure — Arbitration — Jurisdiction of arbitrator — Revoking arbitrator — Grounds for — Arbitration Act 1952 ss 3, 25(2), 26(2)

The plaintiff moved the court to seek a declaration that there were disputes between the plaintiff and the first defendant arising from the second defendant points of claim lodged by the second defendant in the arbitration between the second defendant and the plaintiff. The plaintiff wanted the disputes between the plaintiff and the first defendant to be tried and determined concurrently with the disputes between the plaintiff and the second defendant and by the same arbitrator, that is, the third defendant. The first defendant in opposing the plaintiff's application contended that the disputes between the plaintiff and the second defendant arose out of a contract between the plaintiff and the second defendant, and the arbitration proceeding was commenced pursuant the clauses of the said contract. The first defendant argued that since it was not a party to the said contract, it should not be dragged as a party to the arbitration proceedings. In its application, the plaintiff also prayed in the alternative, to revoke the entire arbitration between the plaintiff and the second defendant. Thus, the issue was whether the court had the power to do so.

Held, dismissing the plaintiff's originating summons:

(1) On the facts, it was clear that the agreement between the plaintiff and the second defendant was independent of the agreement between the first defendant and the plaintiff. The first defendant was not a party to the contract signed between the plaintiff and the second defendant. Therefore, it should not be dragged as a party to the arbitration proceedings (see paras 16–17).

(2) Where the agreement provides for a procedure, the parties must adhere to the procedure. The plaintiff could not straight away come to the court, urging the disputes between the plaintiff and the first defendant be referred to the third defendant and the matter to be tried and determined concurrently with the arbitration proceedings between the second defendant and the plaintiff. The court had no jurisdiction to

compel the first defendant to agree to be joined in the arbitration proceedings between the plaintiff and the second defendant (see para 18).

(3) Further, under the Arbitration Act 1952 ('the Act'), unless the parties agree, the arbitrator himself could not order consolidation or concurrent hearing. The parties must confer such power on the arbitral tribunal before it could order consolidation or concurrent hearings. In each case, the parties must agree to the consolidation of the dispute into a single arbitration or that they should be run concurrently. Thus, the court could not compel the first defendant to refer the alleged dispute between the plaintiff and the first defendant to be tried and determined concurrently with the arbitration proceedings between the plaintiff and the second defendant (see para 20).

(4) An arbitration proceeding could be revoked under ss 25(2) or 26(2) of the Act. In the instant case, s 25(2) of the Act was not relevant as fraud was not an issue in the dispute between the plaintiff and the second defendant. Also, for the plaintiff to remove the third defendant, the plaintiff would have to show that the third defendant had misconducted himself. As no allegation of misconduct had been made against the third defendant in any of the plaintiff's affidavits, s 26(2) of the Act was also not relevant to this application (see paras 24–25).

(5) There was nothing exceptional in the instant case which can induce the court to act under s 3 of the Act to revoke the third defendant's authority. No allegation was made by the plaintiff of any circumstances which would bring the matter within s 3(a) to (d) (see paras 26–28).

(6) The principle established in *Bina Jati* was not applicable in the instant case, as there was no allegation of fraud. In the present case what appears to be the reason for the applicant to make this application was their inability to get the corporation of the first defendant to assist them in their arbitration against the second defendant and now wishes to take action against the first defendant (see para 30); *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 distinguished.

(7) In the circumstances of the present case, the plaintiff could not now make an about turn to have the dispute be moved back to the court. The plaintiff by its conduct was precluded from seeking to revoke the arbitration. Moreover, there was a considerable delay on the part of the plaintiff in making the application (see para 31).

[**Bahasa Malaysia summary**

Plaintiff memohon mahkamah untuk satu deklarasi bahawa terdapat pertikaian antara plaintif dan defendan pertama yang berbangkit dari perkara-perkara tuntutan defendan kedua yang dikemukakan oleh defendan kedua

dalam prosiding timbangtara di antara defendan kedua dan plaintif. Plaintif ingin pertikaian antara plaintif dan defendan pertama dibicarakan dan diputuskan secara serentak dengan pertikaian antara plaintif dan defendan kedua dan oleh penimbangtara yang sama iaitu, defendan ketiga. Defendan pertama melawan permohonan plaintif mengatakan yang pertikaian antara plaintif dan defendan kedua berbangkit dari satu kontrak antara plaintif dan defendan kedua, dan prosiding timbangtara dimulakan mengikut klausa-klausa di dalam kontrak tersebut. Defendan pertama menghujahkan bahawa oleh kerana ia bukan satu pihak kepada kontrak tersebut, ia tidak sepatutnya ditarik sebagai satu pihak kepada prosiding timbangtara tersebut. Di dalam permohonannya, plaintif juga memohon secara alternatif, untuk membatalkan keseluruhan prosiding timbangtara di antara plaintif dan defendan kedua. Maka, isunya adalah sama ada mahkamah mempunyai kuasa untuk berbuat demikian.

Diputuskan, menolak saman pemula plaintif:

(1) Berdasarkan fakta, ianya jelas bahawa perjanjian antara plaintif dan defendan kedua adalah bebas dari perjanjian antara defendan pertama dan plaintif. Defendan pertama bukanlah satu pihak kepada kontrak yang ditandatangani antara plaintif dan defendan kedua. Oleh demikian, ianya tidak patut ditarik sebagai satu pihak ke dalam prosiding timbangtara itu (lihat perenggan 16–17).

(2) Bilamana satu perjanjian memperuntukkan satu prosedur, pihak-pihak mestilah akur kepada prosedur tersebut. Plaintif tidak boleh secara langsung terus ke mahkamah, memaksa pertikaian antara plaintif dan defendan pertama dirujuk kepada defendan ketiga dan perkara tersebut dibicarakan dan diputuskan secara serentak dengan prosiding timbangtara antara defendan kedua dan plaintif. Mahkamah tidak mempunyai bidang kuasa untuk memaksa defendan pertama untuk bersetuju menyertai prosiding timbangtara di antara plaintif dan defendan kedua (lihat perenggan 18).

(3) Selanjutnya, di bawah Akta Timbangtara 1952 ('Akta tersebut'), melainkan jika pihak-pihak bersetuju, penimbangtara sendirinya tidak boleh memberi perintah penyatuan atau pendengaran serentak. Pihak-pihak mestilah memberikan kuasa-kuasa sedemikian kepada tribunal timbangtara sebelum ia dapat memberikan perintah penyatuan atau perdengaran serentak. Dalam kes semasa, pihak-pihak mesti bersetuju kepada penyatuan pertikaian kepada satu timbangtara atau untuk ia didengar serentak. Oleh yang demikian, mahkamah tidak boleh memaksa defendan pertama untuk merujuk pertikaian yang dikatakan itu antara plaintif dan defendan pertama untuk dibicarakan dan diputuskan secara serentak dengan prosiding timbangtara antara plaintif dan defendan kedua.(lihat perenggan 20)

(4) Satu prosiding timbangtara boleh dibatalkan di bawah ss 25 (2) atau 26(2) Akta tersebut. Dalam kes semasa, s 25(2)Akta tersebut tidak relevan kerana fraud bukanlah satu isu dalam pertikaian antara plaintif dan defendan kedua. Juga, bagi plaintif membuang defendan ketiga, plaintif hendaklah menunjukkan bahawa defendan ketiga telah berbuat salah laku. Oleh kerana tiada dakwaan salahlaku telah dibuat terhadap defendan ketiga dalam mana-mana afidavit plaintif, s 26(2) Akta tersebut juga tidak relevan dalam permohonan ini (lihat perenggan 24–25).

(5) Tiada yang luar biasa dalam kes semasa yang membolehkan mahkamah bertindak di bawah s 3 Akta tersebut untuk membatalkan kuasa defendan ketiga. Tiada dakwaan dibuat oleh plaintif mengenai mana-mana keadaan yang boleh membuat perkara berikut terangkum dalam s3(a) hingga (d) (lihat perenggan 26–28).

(6) Prinsip dalam *Bina Jati* tidak terpakai dalam kes semasa, kerana tiada dakwaan mengenai fraud. Dalam kes semasa, apa yang tampak menjadi sebab bagi pemohon membuat permohonan ini adalah ketidakbolehan beliau mendapat kerjasama dari defendan pertama untuk menolong mereka dalam timbangtara mereka terhadap defendan kedua dan sekarang ini ingin mengambil tindakan terhadap defendan pertama (lihat perenggan 30); *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 dibeza.

(7) Dalam keadaan kes semasa, plaintif tidak boleh sekarang ini berpaling tadah dan mahukan pertikaian ini dibawa semula ke mahkamah. Plaintif melalui perlakuannya dihalang dari membatalkan timbangtara tersebut. Tambahan pula terdapat kelewatan agak lama di pihak plaintif dalam membuat permohonan tersebut (lihat perenggan 31).]

Notes

For cases on jurisdiction of arbitrators, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1423–1424.

Cases referred to

Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd [2002] 2 MLJ 71 (distd)
Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping corporation [1981] 1 All ER 289 (refd)
Panchu Gopal Bose v Board of Trustees for Port of Calcutta AIR 1994 SC 1615 (refd)
WY Chin v Sarahon Construction Sdn Bhd & Anor [1994] CLJ 223 (folld)

Legislation referred to

Arbitration Act 1952 ss 6, 25(2), 26(2)
Rules of the High Court 1980

Beldam Premaraj (C M Owee with him) (Sivananthan) for the applicant.
S Kardasivam (PG Lim & Co) for the first defendant.
Lambert Rasaratnam (Nitin Nadkarni and JL Foo with him) (Lee Hishamuddin Allen & Gledhill) for the second defendant.

Raus Sharif J:

[1] By the originating summons dated 6 December 2004, the plaintiff sought against the defendants for the following orders:

I A declaration that there are disputes between the plaintiff and the first defendant arising from the second defendant's points of claim dated 19July 2004 lodged by the second defendant in the matter of a arbitration between the second defendant and the plaintiff;

Consequently —

(i) an order that the disputes between the plaintiff and the first defendant be referred to arbitration and be tried and determined concurrently with the arbitration proceedings between the second defendant and the plaintiff;

(ii) an order that the third defendant be the sole arbitrator in respect of the arbitration between the plaintiff and first defendant;

Alternative consequence —

(iii) an order that the second defendant be restrained forthwith from proceeding with the arbitration between the second defendant and the plaintiff;

(iv) an order that the authority of the third defendant as arbitrator in the arbitration between the second defendant and the plaintiff, be revoked;

(v) a declaration that the second defendant be at liberty to commence a suit in the High Court of Malaya in respect of the disputes or differences between the second defendant and the plaintiff;

II an order that the second defendant and/or the third defendant be restrained forthwith from proceeding further with the arbitration between the second defendant and the plaintiff pending disposal of this originating summons;

III costs; and

IV any further or other relief as the honorable court deem fit.

[2] The events leading to the plaintiff filing this originating summons are these. The plaintiff was appointed by the Government of Malaysia as the contractor for, inter alia, the design, construction, completion and maintenance of a bridge over Sungai Prai, Butterworth, Penang ('the project'). By a letter of award dated 19 October 1996, the plaintiff appointed the second defendant as the contractor for package IB of the Project ('the contract').

[3] Prior to the appointment of the second defendant, the plaintiff had appointed the first defendant to design the bridge for package IB. By the plaintiff's letter dated 16 December 1999, the first defendant was appointed the superintending officer's representative for the project.

[4] On 21 January 2003, the plaintiff issued a notice of default under the contract to the second defendant. Following the notice, the plaintiffs commenced proceedings in Kuala Lumpur High Court vide Suit No D–22–86 of 2003 ('the suit') against the second defendant for, inter alia, the following relief:

(a) a declaration that any termination of the contract pursuant to the notice of default dated 21 January 2003 is lawful;

(b) an order that the off-site casting yard be delivered by the second defendant to the plaintiff; and

(c) damages and costs.

[5] Subsequently, a notice of termination was issued by the plaintiff to the second defendant on 29 January 2003 on the basis of the alleged defaults as set out in the notice of default of 21 January 2003. The alleged defaults were: (i) the second defendant's alleged failure to comply with its work programme; and (ii) the second defendant's failure to comply with the superintending officer's instruction No 23.

[6] The second defendant denied it was in default. According to the second defendant, it was the plaintiff who was in default under the contract, and that consequently, the notice of default by the plaintiff was wrongful. The second defendant contended that the plaintiff was in default by reasons, inter alia of the following:

(a) delay in the issue of construction drawings;

(b) late design information and inadequate design;

(c) inadequate instructions;

(d) extension of time were not properly assessed; and

(e) wrongful termination of the contract.

[7] On 13 February 2003, on the application of the second defendant, the High Court by consent granted a stay of proceedings pursuant to s 6 of the Arbitration Act 1952 ('the Act') for the parties to refer their disputes to arbitration. Thus, by a letter dated 27 March 2003, the plaintiff wrote to its solicitor and the first defendant directing them to begin their preparation for the impending arbitration between the plaintiff and the second defendant.

[8] On 14 November 2003, the second defendant through its solicitor gave the plaintiff notice to arbitrate the disputes, and nominated Dato VC

George, a retired judge of the Court of Appeal to be the arbitrator. The plaintiff, through its solicitor's letter of 16 December 2003, rejected the nomination of Dato' VC George on the grounds that the disputes were technical in nature and instead proposed Mr Leslie Homes, (the third defendant), a retired civil engineer as arbitrator for the arbitration.

[9] The second defendant agreed to the nomination of the third defendant. The third defendant was notified of his appointment by the plaintiff's solicitor in a letter dated 20 February 2004.

[10] On 26 February 2004, the plaintiff notified the first defendant of the appointment of the third defendant as arbitrator in the arbitration and further requested the first defendant for their assistance in the arbitration. By a letter dated 10 May 2002, the plaintiff forwarded to the first defendant a proposed programme for the preparation of documents in respect of the arbitration.

[11] On 17 May 2004, a preliminary meeting in respect of the arbitration was held before the third defendant. The schedule for the conduct of the arbitration was discussed and agreed upon by the parties at this meeting including hearing dates from 26 September 2005 to 16 December 2005 and from 16 January 2006 to 7 April 2006.

[12] On 17 July 2004, the second defendant served its points of claim in the arbitration. By its solicitor's letter dated 10 August 2004 the plaintiff requested an extension of two months to file its points of defence and counter claim in the arbitration. The third defendant granted an extension until 11 November 2004 for the plaintiff to serve its points of defence and counterclaim. Upon the plaintiff's request, the second defendant agreed to a further extension until 18 October 2004 for the plaintiff to serve its points of defence and counterclaim. The plaintiff served its points of defence and counter-claim on 18 October 2004.

[13] By its solicitor's letter dated 22 November 2004, the plaintiff indicated to the third defendant and the second defendant for the first time, its difficulty in obtaining the assistance of the first defendant. In the same letter the plaintiff requested a stay of the arbitration between the plaintiff and the second defendant, failing which it would apply to court to injunct the arbitration proceedings and to remove the third defendant.

[14] On 23 January 2005, the third defendant dismissed the plaintiff application for a stay of the arbitration. Hence, the plaintiff filed this originating summons seeking the various orders as stated earlier.

FINDINGS

(i) Plaintiff's prayer against the first defendant

[15] In gist, the plaintiff was seeking a declaration that there were disputes between the plaintiff and the first defendant arising from the second

defendant points of claim lodged by the second defendant in the arbitration between the second defendant and the plaintiff. Thus, the plaintiff wanted the disputes between the plaintiff and the first defendant to be tried and determined concurrently with the disputes between the plaintiff and the second defendant and by the same arbitrator, that is, the third defendant.

[16] The first defendant in opposing the application contended that the plaintiff's disputes with the second defendant arises out of a contract between the plaintiff and the second defendant, and the arbitration proceeding was commenced pursuant the clauses of the said contract. According to the first defendant since it was not a party to the said contract, it should not be dragged as a party to the arbitration proceedings.

[17] I am in agreement with the first defendant. Quite clearly in this case that the agreement between the plaintiff and the second defendant was independent of the agreement between the first defendant and the plaintiff. The first defendant was not a party to the contract signed between the plaintiff and the second defendant. Instead the relationship between the plaintiff and the first defendant was governed by two agreements signed by the plaintiff and the first defendant, namely: (i) Consulting Engineering Agreement; and (ii) Supervising Consultant Agreement. Both the agreements contained identical arbitration clauses which stated that if any time in question, dispute or differences of opinion shall arise between the plaintiff and the first defendant upon or in relation to or in connection with the agreement or part thereof, either party may:

(a) give notice of the existence of such dispute or difference of opinion and the same shall be referred to arbitrator of a person to be mutually agreed; and

(b) failing agreement then within two months from the date of notice, a person appointed by the President of the Institute of Engineering, Malaysia to be the arbitrator.

[18] Clearly, from the above provisions it was agreed between the plaintiff and the first defendant that any dispute or different of opinion between them shall be referred to an arbitrator to be mutually agreed by the parties. If the parties failed to agree, then the arbitrator shall be appointed by the President of the Institute of Engineering, Malaysia. With that clear provisions, surely, the plaintiff cannot now, straight away come to this court, urging the disputes between the plaintiff and the first defendant be referred to the third defendant and the matter be tried and determined concurrently with the arbitration proceedings between the second defendant and the plaintiff. I am of the view, where the agreement provides a procedure, the parties must adhere to it. The court has no jurisdiction to compel the first defendant to agree to be joined in the arbitration proceedings between the plaintiff and the second defendant.

[19] In *WY Chin v Sarahon Construction Sdn Bhd & Anor* [1994] CLJ 223, Abu Mansor J (as he then was) on the issue: (i) whether the arbitrator had the jurisdiction to hear and make a declaratory order in a third party claim; and (ii) whether it would be irregular, improper or procedurally incorrect for the arbitration to hear a third party claim, held as follows:

> The gist of private arbitration derives from the fact the parties have agreed to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonence with another dispute, however convenient that cause may be to the party seeking it and however closely associated the dispute in question may be.

[20] I share the same view. While the court has always have the power to consolidate actions, it is not the same with arbitration. Under the Act, unless the parties agree, the arbitrator himself cannot order consolidation or concurrent hearing. The parties must confer such power on the arbitral tribunal before it can order consolidation or concurrent hearings. In each case, the parties must agree to the consolidation of the dispute into one arbitration or that they should be run concurrently. Consequently, in the present case, I am of the view that the court cannot compel the first defendant to refer the alleged dispute between the plaintiff and the first defendant to be tried and determined concurrently with the arbitration proceedings between the plaintiff and the second defendant.

(ii) Plaintiff's prayers against the second defendant

[21] The plaintiff's prayers against the second defendant were the alternative prayers. As pointed out by the learned counsel for the second defendant, what the plaintiff was really seeking by those prayers was to revoke the entire arbitration between the plaintiff and the second defendant. Thus, the issue is whether this court has the power to do so.

[22] In *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp* [1981] 1 All ER 289, it was held that the courts have no common law jurisdiction to revoke an arbitration. The jurisdiction is purely statutory. Our Act provides two sources of power to the courts to revoke an arbitration proceedings, that is ss 25(2) and 26(2).

[23] Sections 25(2) and 26(2) of the Act reads as follows:

> 25(2) Were an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

26(2) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the High Court, or a sole arbitrator or all the arbitrators an umpire who has entered on the reference is or are removed by the High Court, the High Court, the High Court may, on the application of any party to the arbitration agreement, either —

(a) appoint a person to act as sole arbitrator in place of the person or persons removed; or

(b) order that the arbitration agreement shall case to have effect with respect to the dispute referred.'

[24] Section 25(2) is very specific. It provides that where an issue of fraud arises in a dispute between parties, the court may order that an agreement to arbitrate cease to have effect, and order the entire dispute be litigated in court. In our present case, fraud is not an issue in the dispute between the plaintiff and the second defendant. Thus, s 25(2) of the Act is not relevant to the present application.

[25] Section 26(2) on the other hand, provides the courts with the general power to revoke an arbitration agreement where the authority of a sole arbitrator or umpire appointed is revoked by leave of court or where the sole arbitrator or umpire is removed by the court. But s 26(2) is only a secondary remedy. The plaintiff would first need to obtain the primary remedy of either having the sole arbitrator or umpire removed, or his authority removed. Inthis case, for the plaintiff to remove the third defendant, the plaintiff would have to show that the third defendant has misconducted himself. But no allegation of misconduct has been made against the third defendant in any of the plaintiff's affidavits. Thus, s 26(2) is also not relevant to this application.

[26] The next question then is, whether the third defendant's authority may be revoked pursuant to s 3 of the Act. Section 3 reads:

3 The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court.

(a) any question of law arising in the course of the reference; or

(b) an award or any part of an award,

in the form of a special case for the decision of the High Court.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the High Court to be stated, notwithstanding that proceedings under the reference are still pending.

(3) A decision of the High Court under this section shall be deemed to be judgment of the High Court within the meaning of section 67 of the Courts of Judicature Act 1964 [Act 91] (which relates to the jurisdiction of the Court of

Appeal to hear and determine appeals from any judgment of the High Court), but no appeal shall lie from the decision of the High Court on any case stated under subsection (1)(a) without the leave of the High Court or of the Court of Appeal.

[27] Clearly, the object of s 3 is to impede the revocation of an arbitrator after he is properly appointed, not to facilitate it. Guidance on when an arbitrator's authority can be revoked is provided in *Panchu Gopal Bose v Board of Trustees for Port of Calcutta* AIR 1994 SC 1615. It was held in that case that the authority of an arbitrator can only be revoked in the circumstances where there is:

(a) excess or refusal of jurisdiction by the arbitrator;

(b) misconduct by the arbitrator;

(c) disqualification of the arbitrator; and

(d) an exceptional case.

[28] In this case, no allegation was made by the plaintiff of any circumstances which would bring this matter within (a) to (c) above. This leaves (d). But it is equally not part of the plaintiff's stated case. From the plaintiff's affidavits, it is apparent that the real reason for this application was the first defendant's apparent refusal to assist the plaintiff in the arbitration. It was when the first defendant's refused to assist the plaintiff on the plaintiff's term, did the plaintiff threaten the first defendant with a claim for indemnity. Thus, to me nothing exceptional about this matter. It is not an extraordinary case which can induce the court to act under s 3 of the Act.

[29] It is the plaintiff's alternative prayer that this court should revoke the third defendant's power and injunct the arbitration between the plaintiff and the second defendant so as to cause the matter to be heard in court and thereby allowing the first defendant to be brought in the same suit using the third party proceedings procedures as provided by the Rules of the High Court 1980. The plaintiff relied strongly on the decision in *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71. In that case, the respondent appointed the appellant as its main contractor to construct a hotel and apartment project in Port Dickson. Pursuant to the building contract, all disputes between the respondent and the appellant were required to be referred to arbitration. The appellant terminated the contract due to non-payment by the respondent of the sum of money purportedly due under the building contract. The parties agreed that their disputes under the building contract be dealt by way of arbitration and an arbitrator was accordingly appointed. However, after the first preliminary meeting was held between the parties, the respondent's solicitor gave notice to the arbitrator that they would be making an application to the High Court to revoke the authority of the arbitrator on the grounds that they wished to raise issues that they would not be suitable for arbitration. The respondent alleged that the appellant, the

architect and the engineer were fraudulent. The respondent succeeded in the High Court in their application seeking, inter alia, a declaration that the disputes between the respondent and the appellant were not arbitable and an injunction to restrain the appellant from proceeding with the arbitration. The Court of Appeal affirmed the decision of the High Court.

[30] Clearly to me, the facts in *Bina Jati* is distinguishable from the present case. In *Bina Jati*, there were allegations of fraud against the appellant, the engineer and the architect. There is no such allegation in the present case. In the present case what appears to be the reason for the applicant to make this application was their inability to get the corporation of the first defendant to assist them in their arbitration against the second defendant and now wishes to take action against the first defendant. To me, the principle established in Bina Jati is not applicable in this case.

[31] The next issue is this. On 13 February 2003, the plaintiff had commenced proceedings in the High Court against the second defendant in respect of the disputes between them. The High court with the consent of the parties stayed the proceedings under s 6 of the Act in order for the parties to refer their disputes to arbitration. Accordingly, they have agreed to the third defendant to be the arbitrator. On 17 May 2004, a preliminary meeting in respect of the arbitration was held before the third defendant. The schedule for the conduct of the arbitration was discussed upon at the meeting, including hearing dates from 26 September 2005 to 16 December 2005 and from 16 January 2006 to 7 April 2006. The second defendant had served its points of claim. Likewise, the plaintiff had also served its points of defence and counterclaim. That being the case, I am of the view that the plaintiff cannot now make an about turn to have the dispute be moved back to the court. Thus, the plaintiff by its conduct is precluded from seeking to revoke the arbitration. Moreover from the facts of this case, there is a considerable delay on the part of the plaintiff in making the application.

[32] For the above reasons, the plaintiff's originating summons dated 6December 2004 is hereby dismissed with costs.

Plaintiff's originating summons dismissed.

Reported by I Izzuddin